Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: July 18, 1997

CASE NO: 95 INA 154

In the Matter of:

ROBERT & KIRSTEN DE BEAR,
Employer,

On Behalf of:

HANNA J. EBERTOWSKA,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Hanna J. Ebertowska (Alien) by Robert & Kirsten DeBear (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

able at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On October 13, 1993, the Employer applied for labor certification to permit her to employ the Alien on a permanent basis as a "Family Dinner Service Specialist, Live Out" to perform the following duties in her household:

> Prepares menus and cooks meals according to recipes. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. Serves meals. Performs seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. Cleans kitchen and washes the dishes. Decorates table and dishes according to the nature of celebration.

The work week was forty hours from 8:00 AM to 5:00 PM with no overtime at the rate of $12.48 per hour. The position was classified as "Cook (Household)(Live-Out), under DOT Code No. 305.281-010. The application (ETA 750A) indicated as education requirements the completion of elementary and high school, and further required that applicants have two years of experience in the Job Offered. AF 08. In an addendum to the application, the Employers discussed "business necessity" by way of justifying their need for a household cook. The Employers said that the cooking would be performed for the members of the Employer's household, which consists of the DeBear, who is a self-employer writer/journalist, Mrs. DeBear, who is an occupational therapist, and the youngest child. AF 09, 42. After the position was advertised, a response was received from one U. S. worker, whom the Employers interviewed and rejected on grounds that he had no experience as a cook. AF 22, 30-31.

Notice of Findings. On June 30, 1994, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted. The CO said the Employer's application failed to establish that the position at issue was permanent fulltime employment within the meaning of the

regulations after considering the application and the addendum noted above.[2] The CO required that this finding be rebutted with

> evidence that the requirement arises from a business necessity rather than employer preference or convenience and is customary to the employer. To establish business necessity under [20 CFR §] 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and {are] essential to perform the job in a reasonable manner.

AF 38. In nine starred paragraphs the CO set out the evidence to be filed in Employer's rebuttal to prove that the job offered is a fulltime position. The required information was stated in the form of requests for specific facts and responses to questions that were designed to draw out the collateral information the CO required to address this issue. AF 36-38. The CO then stated

> We note that this is one of approximately 12 applications filed by Eastern European Council, Ltd., in behalf of employers for fulltime household Cooks. In all applications, the employer responded in an essentially identical manner to a State of New York inquiry concerning who was presently performing the duties of Household Cook: a relative was currently performing the duties and was no longer able because of either personal or health reasons. Please clarify, explaining how the employer handles these duties when the relative, who is not a paid employee, was unavailable, given the employer's demanding work schedule and health problems.

Rebuttal. On July 26, 1994, the Employer filed a rebuttal in which she described her family's need for the services of a cook who was able to prepare nutritious meals or the family. Employer answered the CO's inquiries, describing the amount of time needed to assemble, prepare, and serve the family meals throughout the day and the week indicated in the application. In addition, the Employer noted that business clients were frequently entertained at home during dinners throughout the week.

Final Determination. On August 16, 1994, the CO denied this application for certification on grounds that the Employer failed to prove that the position was permanent fulltime employment in the Employer's household. The CO noted the responses to requests in the NOF for documentation and Employer's responses to these

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[2]The CO cited 20 CFR § 656.50, but there is no such regulation. It is assumed that the CO meant to refer to the definitions for this part at 20 CFR § 656.3, which contain the following: "Employment means permanent fulltime work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."

inquiries, CO concluding that the rebuttal failed to respond satisfactorily to the demands of the NOF.

The work schedule, said the CO, was "unrealistic," pointing out that the work schedule did not account for full eight hour days of work, and that the cook would not be performing any other duties. The CO also pointed out the internal inconsistency in that the time when the meals would be prepared and served extend beyond the normal work day, after the cook would have departed from the job. The CO particularly noted that the employer has never previously employed a fulltime cook, saying that even though this was not a customary requirement the Employer did not indicated a substantial change in household circumstances to justify the need to employ a cook now. For this reason, the CO said

> that the Employer has not established the full-time, permanent nature of the job opportunity; has not established that she has customarily employed fulltime cooks in the past; has not establish any substantial change in house-hold circumstances which would require the hiring of a full-time cook with no duties other than food preparation; and has not established an entertainment schedule which would necessitate a full-time cook.

AF 47. As the CO concluded that the Employer had failed to meet the regulatory requirements, the CO denied this application for alien employment certification.

Employer's appeal. In seeking review of the denial of certification the Employer took issue with the CO's findings as to the household schedule, which she said were inconsistent with the evidence of record. She pointed out that the cook's job was to prepare the meals during the stated working hours without regard to the meal times when the food would be served, adding that the time factors stated in the rebuttal did encompass a total of eight working hours per day for this employee. The Employer concluded that the job duties, as described in the rebuttal do constitute fulltime employment in the context of her household. AF 52-55.

DISCUSSION

The CO initially represented that this application turns on whether the Employer is offering permanent fulltime employment, and the denial of certification is based in part on the CO's conclusion that this was not a fulltime job, based primarily on the CO's interpretation of the schedule of work functions and the required time that was stated in the Employer's rebuttal. The Employer strongly disagrees with this construction, contending that the duties described are sufficiently substantial to occupy an eight hour day of work.

Even though the issue appealed appears on it face to be well joined, it is impossible to address this conflict because the CO also indicates that this application was denied by weighing the Employer's rebuttal in response to directions that the "business necessity" of this position be established. The failure to prove the business necessity of this job is an insufficient reason for the denial of certification, as the Employer is not required to prove the necessity for the position, if a bona fide job does exist. **Abedlghani and Houda Abadi** , 90 INA 139 (June 4, 1991); **Hubert Peabody,** 90 INA 230 (Apr 30, 1991); **Joon Sup Park,** 89 INA 231 (Mar. 25, 1991); **Shinn Shyng Chang,** 88 INA 028 (Sept. 21, 1989); **Timmy Wu,** 87 INA 735 (June 28, 1988). In **Teresita Tecson**, 94 INA 014(May 30, 1995), the Board applied "business necessity" to the hiring of a household employee in terms of documentation of the "business necessity" of a particular restrictive job requirement under the holding in **Information Industries, Inc.**, 88 INA 082 (Feb. 9, 1989)(en banc). Alluding to the employer's requirement that applicants for that position have experience in cooking Filipino food, the panel in **Teresita Tecson** said, "The business in this case is the operation of the household."

As no restrictive job requirement is found in any aspect of this Employer's application, however, it is illogical for the CO to require the Employer to prove that a bona fide job exists by demonstrating its "business necessity," a notion that has nothing to do with either the content of the job or the time required to accomplish the work, itself. For this reason, it is concluded that the CO was in error in requiring the Employer to prove the "business necessity" of this position and in considering this as a primary criterion in denying certification. In view of this error, the CO must be given the opportunity to reconsider the reasons for denying certification in this case.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is hereby vacated and this file is remanded for reconsideration in accordance with the foregoing decision.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

I concur in the result, only.

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Sheila Smith, Legal Technician

BALCA VOTE SHEET

CASE NO: 95-INA-154

ROBERT & KIRSTEN DE BEAR,
Employer,
HANNA J. EBERTOWSKA,
Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 16, 1997